No. 18913

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED A. ALEXANDER, LOUIS P. CAMAROTA, GEORGE CATHRO, ALBERT S. DIMOND, LEWIS FREEMAN, RANK MARANI, RAY C. MARVIN, JAMES NEWELL and EARL D. PETERSEN,

Appellants,

-vs-

PACIFIC MARITIME ASSOCIATION, a non-profit corporation; INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, an unincorporated association; SHIP CLERKS ASSOCIATION, LOCAL 34, ILWU, an unincorporated association; JOINT CLERKS LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association; H. J. BODINE, L. B. THOMAS, WILLIAM CHESTER, K. F. SAYSETTE, J. A. ROBERTSON and HUBERT BROWN as Trustees of ILWU-PMA WELFARE & PENSION FUNDS: HARRY BRIDGES, H. J. BODINE, L. B. THOMAS, K. F. SAYSETTE, R. J. PFEIFFER, and CAPT. C. PRYOR as Trustees of ILWU-PMA MECHANIZATION FUND: DOES ONE thru TWENTY,

Appellees./

On Appeal from the United States District Court
for the Northern District of California
Southern Division

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

The action on appeal is one at law for enforcing of and for violations of the written collective bargaining agreement, under Section 301. The appeal (R-183) is taken from the order of the District Court of July 19, 1963. The Statement of Facts appears in the Appellants' Opening Brief, and need not be repeated.

APPEALABLE ORDER

Appellees' Brief contends that the order on appeal is not appealable. The order stays the plaintiffs' legal action brought under Section 301 pending arbitration, without specifying what acts the parties may take. It is a decree of specific performance of a claimed contract to arbitrate. It leaves the plaintiffs with a choice of abandoning or losing their legal rights and remedies or to undertake arbitration pursuant to some unknown, undefined, nebulous and changing provision before their adversaries who are to judge their own acts and their own conduct.

Appellees' Brief makes no reference to 28 USCA 1292 (1) nor to the Ninth Circuit Decision of Ross v. Century Fox Film Company, 236 Fed. 2d 632, and proceeds to argue that the Appellees' motion, which was granted, is not in effect a cross bill or request for relief similar to the order in Goodall-Sanford, Inc. v. United Textile Workers 353 US 550. That case held that arbitration sought by a party to a collective bargaining agreement and an order thereon is appealable.

Appellees' Brief attempts to claim that this Court's decision of Hudson Lumber Co. v. U. S. Plywood 181 Fed. 2d 929, arising under the Federal Arbitration Act, was reversed by other cases involving other rules of law that did not even mention the Hudson decision.

Shanferoke Coal and Supply Corp. v. Westchester Serv. Corp. 293 U.S. 449, 55 S. Ct. 313 (decided the same day as the Enelow v. N.Y. Life Ins. Co. 293 U. S. 379) held that denying a stay to the equitable defense of arbitration by contract was in effect denying an interlocutory injunction, and appealable. To the same effect is the decision of Donahue v. Sequehanna Colleries Co. 3 Cir. '43, 138 Fed. 2d 3, where the plaintiff employees sued for overtime, and the defendant moved to stay the action pending arbitration under the collective bargaining agreement. The order on the motion was held appealable. A similar case also involving a suit for the overtime wages, and also one where the defendant set up the collective bargaining agreement providing for arbitration, the order thereon was also held appealable, was Gatliff Coal Co. v. Cox 6 Cir. '44, 142 Fed 2d 876. International Union v. Colonial Hardwood Floors 4 Cir. '48, 168 Fed 2d 33 was an action under Sec. 301 upon a collective bargaining agreement for damages arising from a strike. The Union moved for a stay pending arbitration under the collective bargaining agreement. A denial of the order was held appealable.

American Locomotive Co. v. Chemical Research Corp. 6 Cir. '48 171 Fed 2d 115 (cert. den. 336 U. S. 909) was an action for breach of contract involving a license to manufactur and the motion was made to stay the action pending arbitration. The Court held that order, though interlocutory, was appealable.

Hudson Lumber Co. v. U. S. Plywood Corp. 9 Cir. 1950 181 Fed. 2d. 929, involved a declaratory relief action where the defendant obtained an order staying the action pending arbitration under the contract provisions. This interlocutory order was held appealable.

Wilko v. Swan 2 Cir. '53, 201 Fed. 2d 439 held that an interlocutory order denying a stay in a motion to have arbitration under a written margin agreement between the customer and broker in the principal action for violation of the Federal Securities Act, was appealable.

Baltimore Contractors, Inc. v. Bodinger 348 U. S. 176 involved an equitable action brought in the State Court and removed to the Federal Court for diversity. There was a motion for a stay under the Arbitration Act as the contract, the subject of the equitable State Court action, provided for disputes on matters of mathematics and computations to be determined by a named auditor, and his determination would be binding. The Court held that this was not an agreement to arbitrate but was limited solely to mathematical disputes, that it was a purely equitable action and a stay order is not an injunction; but in legal action, it is an injunction to stay the action and is appealable. The appellees cite Wilson Brothers v. Textile Workers 2 Cir. 55, 224 Fed. 2d 176 involving a suit in equity to avoid the duty to arbitrate under a collective bargaining agreement, the Court stayed the action pending arbitration. The Court held that this was not an appealable order as the Court cannot abandon the distinction between law and equity under the former practice. The order is appealable if it is an action at law, and it is not appealable if the suit is wholly equitable.

II THE ORDER REFUSING TO ENFORCE JUDGE SWEIGERT'S ORDER FOR ANSWERS TO INTERROGATORIES IS AN APPEALABLE ORDER.

Appellants' Opening Brief assumed that since the order requiring arbitration was clearly appealable, the Court on appeal would review all matters in the record, including the refusal of this District Court to enforce Judge Sweigert's order directing the defendant PMA to answer the interrogatories, many of which were addressed to the evidences of and what constituted the collective bargaining agreement, as well as whether the proper parties were before the Court, and leads to evidence.

It should be noted that there were many millions of dollars not

represented by the trustees of the jointly trusteed funds Report to the Federal Government, (Depos. Ex. 44, 45 & 46) and the monies testified by Mr. St. Sure in his deposition, to have been paid to these trustees created in part by labors of the plaintiffs. Appellees' Brief does not even comment on this. It is necessary to have all of the parties who hold these funds before the Court in order to have a complete adjudication. Interrogatories were addressed to this matter.

Appellees cite Howard Term. v. U. S. 9 Cir. '56, 239 Fed. 2d 336, a case seeking to set aside and review an order of the Maritime Board dismissing some of the grounds of the appellants' proceedings before the Board, but leaving other allegations going to the validity of the operating agreement, upon which the appellants might well have their complete relief. This Court held that this motion to dismiss as to part of the Board's proceeding and the order thereon, was not a final and appealable order. It differentiated Isbransten Co. v. U. S. 93 U. S. App. D.C. 293, 221 Fed. 2d 511, where an order of the Board for dual rate system was put into effect in 48 hours and directing subsequent hearings upon the appellant's protest was appealable and reviewable, because the Isbransten case order had an immediate effect and consequences upon the petitioner, and the order appealed from would cause the appellant to suffer real and immediate harm.

Appellees cite and quote from Collins v. Miller '20, 252 U.S. 364, involving a habeas corpus upon extradition proceedings under a treaty with Great Britain in which the Commissioner took testimony and permitted the defendant to offer testimony as to one charge, but not as to the two other charges pending in India against him. A writ of habeas corpus was granted as to the two charges, but denied as to the one for which the petitioner was granted a hearing and opportunity to give evidence, and the matter was referred to the Commissioner for further proceedings to take testimony and to permit the petitioner to give testimony on the two charges in which he was

denied his prior hearing. The Collins case held that the habeas corpus order had not disposed of the case and that the order was not final and not appealable. No such circumstances exist in the case at bar, nor do the facts even approach or present the same rules of law as those involved in the Collins case.

Appellees cite Cobbeldick v. U. S. 309 U.S. 321 involving an appeal from an order denying a motion to quash a subpoena duces-tecum before a grand jury. The Court pointed out that if the appellant refuses to comply, he may be committed for contempt and that he could appeal from that order of contempt. The Court differentiated this situation from a patent suit where the grand jury sought to obtain an order to produce documents in the patent suit and the Court held the order appealable as mischief would be done by the order appealed from, but that in ordinary criminal cases where a witness is subpoened to appear and produce documents before a grand jury, such delays as the appellant sought affected the orderly processes of criminal justice.

Appellee cites DiBella v. U. S. 369 U.S. 121 involving a motion to suppress evidence in a criminal case, obtained by an unlawful search and seizure. The Court held that in post indictment motions, the order refusing to suppress the evidence was not appealable, but the rule is otherwise where there was a motion for return of property if there was no criminal prosecution in existence, in which case the order of denial is appealable.

Appellee cites U. S. v. Woodbury 9th Cir. 263 Fed. 2d 784 involving discovery proceedings in a civil action under the Tort Act. In the Woodbury case the Court held that if there were no "controlling questions of law", the District Court cannot grant leave to appeal under Sec. 1292 (b), and this question of "controlling question of law" is reviewable by the Appellate Court. No such problem or question is presented in this appeal.

Appellee cites U. S. v. Rosenwasser 9 Cir. 263 Fed. 2d 784, involving an appeal from an order granting a motion to suppress evidence from an illegal search and seizure. The Court pointed out that there is no statutory authority for the Government to appeal from an order to suppress or return evidence for illegal searches and seizures.

Appellee cites Hartley Pen Company v. U. S. District Court, 9 Cir. '61 287 Fed. 2d 324, involving a writ of mandate to set aside a District Court order directing a discovery in a breach of warranty suit. The discovery was directed to the trade secrets in the ink used in the ball point pens, and was directed to matters which were not the subject of the suit. The Court granted the writ, holding that the disclosure would cause irreparable damages and force the party to abandon his suit or suffer this irreparable damage from the disclosure.

In the case at bar, the interrogatories ordered answered, in a large part, go to the very issues of what is the collective bargaining agreement, its proof and its evidences, and whether the proper parties are before the Court for a complete adjudication. The interrogatories are also addressed to the existence of evidence such as documents, records and identity of persons who can testify on deposition. The interrogatories are in page 6 et seq. of the Record.

Discovery is not open to the parties during arbitration. A deposition may not be taken when all proceedings are stayed for arbitration.

4 Moores Fed. Prac. 1092 Note 3

Discovery is not available to parties in arbitration.

Comm. Solvent Corp. v. La. Liq. Fertilizer Co. D.C.-N.Y. '57 20 FRD 359.

Penn Tanker Co. of Del. v. C.H.L. Rolimpex D.C. N.Y. '61 199 Fed. Supp. 716.

Parties to arbitration under Sec. 301(a), do not have the right of discovery.

Penn. Greyhound Lines v. Amalgamated Assoc. etc. D.C.-Pa. '51 98 Fed. Supp. 789 (rev. on other grounds 193 Fed. 2d 327)

Note: The District Court decision in the Penn. Greyhound Lines, in 98 Fed. Sup. 789 is cited with approval in Drakes Bakery v. Local 50, 370 U. S. 254 at 262, Footnote 9, for another proposition.

Without the aid of the Federal rules and their discovery procedure, the appellants are very badly prejudiced and may well forfeit much of their rights for lack of proof. For example see Amended Compl.p. 23-4(R-42-3).

It may then be safely stated that under the doctrine of the cases cited by the Appellees' Brief, mentioned above, irreparable damage and injury is certain to result to the plaintiffs, and therefore this order denying sanctions is properly appealable.

It should be pointed out that on the factual issues as to what was the collective bargaining contract when the action was commenced, determines the question as to whether the contract does in fact require the issues to be arbitrated. Under no rule of law may the plaintiffs be denied their discovery going to these issues as to what constitutes the contract, and as to whether the proper parties are before the Court for a complete adjudication, and therefore the order denying enforcement of Judge Sweigert's order requiring answers to the interrogatories is clearly appealable.

III OBLIGATION TO ARBITRATE

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute he has not so agreed to submit.

Atkinson v. Sinclair Refining Co. 370 U.S. 238;

United Steel-Workers v. Warrior Nav. Co. 363 U.S. 574, concurring opinion at 582;

Drakes Bakery v. Local 50, 370 U.S. 254 at 262, Footnote 9.

There is no contract to arbitrate the issues in this action set forth in the Amended Complaint, commencing with the Master Agreement for Clerks.

The defendants are sued at law for a breach of their contract, and having violated their contract, and failed to observe it, seek to defend on the grounds that the disclosed written contract is not the contract in effect, but claim that there is an oral agreement between the defendants that the Longshore Agreement, designated by them as the "Gray Book", providing for arbitration when there is discrimination against a non-union longshoreman applies to these ship clerk plaintiffs. The affidavits on the motion for summary judgment place in issue the contract and its provisions. It also pleads the fact that before the action was filed, demand was made to arbitrate, if there were any contract provisions as to arbitration, and this the defendants refused to do. Now having required the plaintiffs to bring their action by refusal to arbitrate, they ask to stay the action necessitated by their refusal. Nine months elapsed between the commencement of the action and the motion for summary judgment and for the stay and for arbitration. Their conduct and defense of the litigation for this period without moving for the stay and requesting arbitration, is clearly a waiver. Furthermore, in a similar matter involving another ship clerk, Roper, there was no arbitration permitted. In the action involving different parties in the State Court, known as Andrews v. PMA, the defendant PMA, and defendant Union having obtained a stay, both protested any attempt to arbitrate and have delayed even a hearing on the merits before the defendants' own arbitrator for a full calendar year, and at every turn contend there is some secret contract provision not theretofore disclosed, which is an excuse for a delay or prevention of any arbitration hearing or a determination on the merits. An order which stays proceedings pending arbitration, on some unknown, undisclosed and nebulous contract, is hardly a remedy. Its effect is final and irreparable.

Appellees cite Drivers Union v. Riss & Co. 372 U.S. 517, an action to enforce an award under a collective bargaining agreement. There

the Court pointed out that the agreement need not use the word "arbitration". The Court held that if after a trial, the award is not final and binding under the agreement, no action under Section 301 will lie to enforce it, but suit will lie under Sec. 301 for breach of the contract. St. Sure (Depos. pg. 69) testified that arbitrators' awards under the contract were not final, but can be and are actually modified by agreements between the PMA and ILWU. See also Edwards v. Cap. Airlines 176 F2 754.

Appellees cite Humphrey v. Moore 375 U.S. 335 involving a contract that provides where seniority is an issue due to the consolidation of two carriers, it shall be determined by a certain committee existing under the contract, and in line with Elgin J.E.R. Co. v. Burley, 325 U.S. 711, the exclusive collective bargaining agent has authority to make determinations as to future conduct, but does not have power to bind the individual as to matters of past acts, remedies, and rights thereunder. See Donnelly vs. United Fruit Co. 40 N.J. 61, 190 A. 2d, 829, cited by Appellees and containing an interesting discussion, including the duty of the collective bargaining agent to act impartially for all employees and citing the Ford Motor Co. case 345 U.S. 330, Steele v. Louisville, etc. R. Co. 323 U.S. 192, Gainey v. Brotherhood 3 Cir. 313 Fed. 2d, 318, and Hughes Tool Co. v. NLRB 5 Cir. 147 Fed. 2d, 69.

None of the cases cited by Appellees require arbitration where it is not required by the contract. None of these cases cited by Appellees require an employee to submit his disputes for determination to his adversaries for their decision.

The bargaining agreements are very cleverly drawn to prevent the plaintiffs, and those similarly situated, from having any remedy at all before any so-called grievance machinery. The sole right granted is that to go before the defendant Port Committee and to ask this Committee to pass upon its own wrongful acts in refusal to perform the contract as to

registration and dispatch. Indeed, these agreements are drawn with a view that the defendant, PMA, is on one side, and the Union is on the other in any grievance procedure, and none provide for the situations in this case, where the principal contract violator is the defendant Port Committee consisting of members selected and directed by the Employers and members selected and directed by the Union, and in which a unanimous vote of one vote to each side is necessary for any action, and only in the event of their failure to agree, (and they agree in all matters in the case at bar) may any matter go to arbitration. Only when there is a dispute between PMA and the Union can it go to arbitration, and the arbitrator's powers are very carefully limited and prescribed. The arbitrator is one who holds his lucrative position at the pleasure of the PMA and the Union, and no one in the plaintiffs' position would expect the arbitrator to act contrary to his own financial interests, should it ever reach a point to where these defendants, PMA and ILWU, should disagree, which they have not done in this case.

IV PENDANT JURISDICTION

This Court has held that where the written agreement grants preference of registration and dispatch to Union membership, the contract is illegal and void. The ILWU and PMA have not changed their stripes, but they have written their contract to appear innocent upon its face, nevertheless still granting the priority of registration and dispatch to Union members in the manners set forth in our Briefs and in the plaintiffs' Amended Complaint. It is just as wrong for the defendants, PMA and ILWU, to grant priority and preference to registration and dispatch to Union members in violation of the contract, as it is to make the written contract that came before this Court and was held void because it granted this priority of registration and dispatch to Union members. It is also

wrong to violate contractual obligations by acts which are also violation of the specific covenants in the collective bargaining agreement against discrimination for lack of union membership.[1/]

The Federal Court having acquired jurisdiction, may proceed to a complete adjudication of all matters involved in the litigation even though these other matters involved are matters solely of general law within state court jurisdiction. Federal Courts adjudicate all matters involved and are not limited to the matters conferring Federal Court jurisdiction.

Railroad Comm. v. P.G. & E. 302 U.S. 388, 82 Law Ed. 319;

Hopkins v. So. Cal. Tel. Co. 275 U.S. 393, 72 Law Ed. 739;

Chicago, etc. Ry. Co. v. Kendall, 266 U.S. 94, 69 Law Ed. 183;

United Fuel Gas Co. v. Ry. Comm. 278 U.S. 300, 73 Law Ed. 390.

The Federal Court having jurisdiction on one ground, had the right and duty to decide all questions in the case even though it decided the Federal question adverse to the plaintiff or even if it omitted to decide the Federal question and decides the case on a point of State law question not involving Federal Court jurisdiction.

Hurn v. Oursler, 289 U.S. 238.

This is sometimes called jurisdiction of non-federal claims "pendant" to District Court jurisdiction.

Ellis v. Carter, 9 Cir. 291 Fed. 2d 270.

An example appears in the complaint where the plaintiffs plead

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1/ Mr. St. Sure testified on his deposition (Depos. pgs. 98-9) that the clause against discrimination against non-union employees has been a part of the maritime contracts for many years. As recently as the Memorandum of Agreement of June 22, 1962 (Depos. Ex. 21), there was a specific provision and covenant against discrimination applicable to all the various maritime contracts including the Ships Clerks.

the employment by the Union and compensation of the Union as their agent, not only as an agent for hire, but also the statutory exclusive collective bargaining agent, and the violation of this agent's duty.

In an action under Section 301, upon the collective bargaining contract, the fact that the breach of contract is also arguably within the definition of an unfair labor practice, does not divest the court of jurisdiction. If there were any question on this point, it is forever closed by the direct holding in Doyle Smith v. Evening News Association 371 U.S. 195, 9 Law Ed. 2d, 246. It is also the holding in:

Dowd Box Co. v. Courtney 268 U.S. 502, 82 S.Ct. 519;

Teamsters v. Lucas Flour Co. 369 U.S. 95, 7 L. Ed. 2d 593;

Plumbers, etc. v. Dillion 9 Cir., 255 Fed. 2d 820;

Indep. Petr. Workers v. Esso Std. Oil Co. 3 Cir., 235 Fed. 2d 401;

Machinists v. Cameron Iron Works 5 Cir. 258 Fed. 2d. 467.

Appellees' Brief contends that because appellees' breach of this contract also amounts to an unfair labor practice, these allegations of the amended complaint should be disregarded. Their Brief forgets the "pendant" to Federal Court jurisdiction rule that permits the Federal Courts to make a complete adjudication of all matters, including matters cognizable at law before the state courts, such as violation of an agent's duty to its principal.

V. SEPARATE TRIALS OF ISSUES

Appellees' Brief attempts to justify a determination of the terms of a contract upon conflicting affidavits and determination that there is a contract to arbitrate, and the complete disregard of the issues of waiver and estoppel, by the power of the Court under Rule 43 (b) that a Court can order separate trials on any claim, cross-claim, counter-claim, or third-party claim or issues.

Appellees' Brief seeks to justify the refusal of the Court to enforce Judge Sweigert's orders to answer the interrogatories, upon the contention of separate issues.

The error appears when the only issues drawn are those upon the affidavits for summary judgment as to the existence or non-existence of a written contract provision to arbitrate, and upon the issues of waiver and estoppel. There have been no issues drawn by any responsive pleading in the form of an answer to the Amended Complaint. Until there has been an answer filed, no one can state what the actual issues of fact are in this case to decide which shall be tried first.

5 Moores Federal Practice 121, Section 43.03, in discussing Rule 43(b) points out that a single trial generally tends to lessen delay, expense and inconvenience to all concerned, and that the Courts often emphasize that ordering separate trials are only justified when such a disposition is clearly necessary, as for example, the defense of the statute of limitations, release, statute of frauds, invalidity of patents, or other defenses would make unnecessary the trial of more complicated issues in the case. This treatise points out the severance of issues are also only justifiable when there are permissive counter-claims wholly unrelated to the principal cause of action or there are third-party claims joined under Rule 18(a).

In the case at bar, the issues as to what is the written contract and whether it provides for arbitration are issues of fact to be tried before a jury.

When the written contract is determined, it is then a question for the District Court to determine whether the case has any arbitrable issues under that contract, and what they are.

There is also the issue of waiver and estoppel that involve questions of fact, which must be tried by a jury.

None of these factual issues can be determined by summary judgment upon conflicting affidavits, nor can they be determined by the testimony in a discovery deposition contrary to opposing affidavits.

In any event under any theory, the plaintiffs are entitled to answers to their interrogatories addressed to what is the written contract, and to whether all of the proper parties are before the Court, and to matters leading to the discovery of persons competent to testify upon oral depositions, and to the existence of documentary evidence.

It is a general principle applicable to actions at law that legal actions be brought by the person whose legal rights have been affected. The Amended Complaint (R-20) pleads legal rights of the plaintiffs and appellants based upon the written collective bargaining agreement that have not been observed or performed by the defendants. How plaintiffs' "standing to sue" is in issue without an answer being filed, we are at a loss to understand. How any discovery can be limited by a non-existent issue of plaintiffs' "standing to sue" is not explained. There may be some factual basis not yet disclosed in any pleading. Until it is pleaded, the plaintiffs are entitled to discovery and to enforcement of Judge Sweigert's order to answer their interrogatories. (R-84). The defendants' "Notice of Motion for Separate Trial of Issues, etc." (R-119) specified no basis other than "standing to sue" without mention of any grounds. Their "Memorandum of Points and Authorities in Support of Motion for Separate Trial of Issues of Plaintiffs' Standing to Sue and Motion to Limit Discovery to Matters Relevant to said Issues" (R-123) states the sole grounds on lines 13 to 16, page 2, (R-124):

> "The question of plaintiffs' standing to sue goes to the question of whether plaintiffs have stated a cause of action, which question is broadly raised by defendants' previous motions filed May 6, 1963."

CONCLUSIONS

1. The actions by the Amended Complaint are at law under Sec. 301 upon the written collective bargaining agreement, both to recover monies due under that contract by a money judgment, and for damages for breach. Any injunction or stay order staying this action is clearly an appealable order, whether the order is interlocutory or final.

2. District Judge Sweigert made an order directing the defendants to answer interrogatories upon discovery. The defendants refuse to comply with the said District Court's order, and the only remedy remaining is to impose sanctions for failure to obey the lawful order of the District Court. Answers to the interrogatories are necessary to not only discover the persons from whom depositions may be taken and to ask for the production of written evidence, but it also goes to the existence of and the evidence of the very collective bargaining agreement in dispute and to determine its terms. It also goes to the point as to whether all of the proper parties are before this court, particularly those who hold a large part of the jointly trusteed funds that do not appear from the Federal Reports (Depos. Ex. 44, 45 and 46).

3. The contract of 1948 was declared illegal and void by this Court because the said contract granted priority of registration and dispatch to union members. By clever draftsmanship, creating an innocent appearing seniority date, and by breach of the contract, and by breach of the common law duty of an agent to its principal, this practice has been continued, and priority of registration and dispatch, that was held void, has been continued unabated and unchanged by this Court's important adjudication. The plaintiffs are entitled to their action at law under Section 301 to enforce this contract and recover their unpaid compensation and benefits for their services, and they are entitled to recover their action at law for damages for breach of the contract. Any order undertaking to

restrain and enjoin or to stay this legal action, is an order that is appealable, regardless of whether the order is a final order or an interlocutory order, by express act of Congress and by numerous decisions of the Federal Courts.

4. Discovery is necessary to not only determine the actual contract, and whether it is in fact one in writing containing an applicable arbitration provision, and what these present arbitrable issues are as a matter of law, but this discovery is also most essential to properly present the particular case to any tribunal, court or arbitrator. Any order denying this discovery, not only prevents the plaintiffs from making the necessary proofs as to the contract and its terms, but it also prevents the plaintiffs from presenting and obtaining the necessary evidence to show the long series of conducts that constitute the violation of the contract, and of the agent's duty to the principal. Discovery is also necessary to determine whether the proper parties defendants are all before the Court for a complete adjudication. It is necessary to prove much of the damages.

5. It is respectfully submitted that before the plaintiffs are completely denied all effective remedy, that they should have their day in Court for a determination of the facts as to the contract, and what this contract actually contains, and that it should not be determined upon a motion for summary judgment upon conflicting affidavits. The factual issues of waiver and estoppel must also be tried, and cannot be disposed of by affidavits, which facts we might point out are not even denied by the defendants.

Dated: This 27th day of March, 1964.

HOWARD B. CRITTENDEN, JR.
Attorney for Appellants